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The Politicisation of Hate Speech Bans in the Twenty-first-century Netherlands: Law in a Changing Context

Marloes van Noorloos

In the past decade, the intense debate about multiculturalism and immigration has led to a questioning of the limits of criminal law on hate speech in the Netherlands. The freedom of expression/hate speech dilemma, with its delicate relationship between freedom of expression, non-discrimination and freedom of religion, has itself become a battle ground in public discourse about multiculturalism. This paper seeks to analyse how legal developments around hate speech bans in the Netherlands (in legislation, case law and prosecution policy) have interacted with sociopolitical changes in a multicultural society in the twenty-first century, and how hate speech bans have become politicised. It will show how developments in the Dutch ‘free speech v. hate speech’ debate have led to contestation over fundamental rights and the role of the judiciary versus the legislature, now that the judiciary is being called in to regulate a sensitive sociopolitical conflict. The paper also shows how since 9/11 there has been an ‘asymmetrical’ use of hate speech bans, to protect the majority against radical minorities, and examines what this implies in terms of the ‘militant democracy’ idea. Asymmetry is also apparent in the way freedom of speech functions in public debate, where many use the free speech argument rhetorically as the right to ‘say what they think’, but do not necessarily grant the same right to their adversaries.

Keywords: Netherlands; Hate Speech; Freedom of Expression; Politicisation

Introduction

In 2011, the Dutch populist MP Geert Wilders had to face criminal charges for hate speech against Muslims. He was eventually acquitted, but the trial laid bare many of the challenges facing the use of hate speech laws in the changed legal and political

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climate of the Netherlands. The freedom of expression/hate speech dilemma, with its delicate relationship between freedom of expression, non-discrimination and freedom of religion, has itself become a battle ground in Dutch public discourse about multiculturalism.

This paper seeks to analyse how legal developments around hate speech bans in the Netherlands, in legislation, case law and prosecution policy, have interacted with sociopolitical changes in a multicultural society in the twenty-first century, and how hate speech bans have become politicised. It will show how the developments in the Dutch ‘free speech v. hate speech’ debate have led to contestation over fundamental rights and the role of the judiciary versus the legislature, now that the judiciary is being called in to regulate a sensitive sociopolitical conflict. The paper also shows how since 9/11 there has been an ‘asymmetrical’ use of hate speech bans, to protect the majority against radical minorities, and examines what this implies in terms of the ‘militant democracy’ idea. Asymmetry is also apparent in the way freedom of speech functions in public debate, where many use the free speech argument rhetorically as the right to ‘say what they think’, but do not necessarily grant the same right to their adversaries.

I first sketch the way hate speech was dealt with in the 1970s–1990s in order to put recent developments in a wider perspective (part two). Part three deals with the paradigm shift in the sociopolitical context, and the legal developments that have taken place around hate speech in the twenty-first century; in part four special attention is paid to the prosecution and acquittal of Wilders. In part five, the politicisation of hate speech in the Netherlands is analysed. In the final part, I argue that in this changing context, hate speech laws may not be the best avenue to protect minorities. Though the paper focuses primarily on the Dutch situation, several of the developments outlined also illuminate what has been happening in other European countries.

The Development of Hate Speech Laws 1970s–1990s

Since the 1970s (and partly since the 1930s), Dutch law has included criminal offences of *group insult* (article 137c Criminal Code) and *incitement to hatred, discrimination or violence* (article 137d Criminal Code) on account of race, religion or belief, gender, hetero- or homosexual orientation or handicap (and, for article 137d, gender). ‘Insult’ refers to offending a person’s honour or moral integrity (Janssens and Nieuwenhuis 2008, 35). Accordingly, this also focuses on the effect of speech in the eyes of other people (‘negative imaging’) as does article 137d. In this contribution, I will refer to both offences, which are often used together in legal practice, under the common denominator of ‘hate speech’. Both offences were meant to regulate several kinds of speech, political speech included, and were occasionally used to prosecute politicians who expressed strong criticism of immigration. For a long time, these legal constraints on hate speech were in line with the reality of public debate: until the 1990s, Dutch public discourse on multiculturalism was moderate and self-controlled.

Robust criticism of multicultural society often led to moral indignation and accusations of racism. Bagley, who conducted comparative research about race relations in the UK and the Netherlands in the 1960s, found that:

the Dutch have an unshakable belief in the high standards of Dutch hospitality to oppressed aliens and refugee groups, and secondly a firm conviction that no race prejudice exists in the Netherlands. These assumptions have been built into the Dutch value structure over a period of many years. (Bagley 1973, 92)

Although both positive and negative stereotypes about immigrants were widespread, 'the Dutch newspapers accepted in good faith official versions of immigrant behaviour and problems, and the official versions tended to view immigrants in a favourable and sympathetic light' (Bagley 1973, 167).

In the 1960s–1970s, the government (*Kamerstukken a*) found special laws against racial hatred of little relevance: the idea was still prevalent that racial discrimination was largely absent in the Netherlands (see Larsen's article in this special issue, which shows that such ideas were also prevalent in Danish debates about blasphemy). It may therefore seem surprising that in 1971, new hate speech offences were adopted. The main reason for adopting the new laws was actually the desire to comply with international legal obligations (the UN Convention on the Elimination of Racial Discrimination, CERD). The authorities did not expect to make much use of the new legislation: according to legislative history actual prosecution for such offences would be the exception since criminal law should be a last resort. Hate speech legislation was rather viewed as a symbolic means of upholding the norm of equality. In this regard, it is interesting to draw a parallel with the law of England and Wales: there, more narrowly formulated hate speech legislation was adopted in 1965, which only dealt with racial hatred; in 2006, this was extended to religious hatred and in 2010 to sexual orientation. The law in 1965 was fuelled by increasing racial tensions and activities of neo-Nazi groups (Williams 1967) and was adopted after heavy opposition in Parliament and the media; it was meant only to deal with 'dangerous, persistent and insidious forms of propaganda campaigns' that could lead to violence.¹ Dutch law from the outset covered a wider range of speech, in line with the realities of public debate (which was very different from England and Wales: there, racism was much more prevalent in public debate during that period).

After immigration increased in the 1970s, discrimination and ethnic conflict did find their way into the Netherlands, but not in an extreme way. A strong stance against racism was still the dominant attitude among politicians and the media. By the end of the 1970s, when it was slowly becoming clear that most immigrants were here to stay, the government set out actively to facilitate minorities' integration into Dutch society (Penninx 2005). To this end, and in view of the increasing difficulties surrounding integration during the economic downturn of the 1980s, the government attempted through its Ethnic Minorities Policy not only to influence the *treatment* of minorities (actual discrimination) but also the *debate* ('discriminatory' speech); countering negative perceptions of minority groups was part of this policy. This

included effective enforcement of criminal law on hate speech, which was regarded as an important way to counter random subordination of groups (*Kamerstukken b*). The basic principle of restraint in prosecuting for hate speech was left behind (Nota Minderhedenbeleid 1982–1983, 96–97).

The informal public ban on discriminatory expressions in the media and in politics remained relatively strong throughout the 1980s–1990s. On several occasions, the courts used hate speech law to set limits to the expressions of far-right politicians in the area of immigration (Supreme Court *a*, *b* and *c*). For instance, the Supreme Court upheld a conviction in 1994 under article 137c for possession of leaflets of far-right party CP'86, which suggested a relationship between immigration and criminality and spoke about a 'multiracial hotchpotch' (Supreme Court *a*). This was in line with the intention behind the adoption of articles 137c–d in the 1970s, which were mainly meant to implement the CERD into Dutch law: Article 4(c) CERD also forbids public authorities to promote or incite racial discrimination.

The government and antiracist groups were very active in countering anti-immigrant speech; moreover, demonstrations by far-right organisations were often prohibited for public order reasons (Van Donselaar 1997, 24). Racist expressions generally led to public outrage, and the far-right did not become as strong a force in the Netherlands as in some other European countries, not least because of internal struggles within their organisations (Van Donselaar 1991, 12–14). During the 1990s, the government did, however, set out a stricter policy of 'civic integration' for minority groups, having become more conscious of their economic marginalisation and segregation.

Paradigm Shift and Legal Developments in the Twenty-first Century

The sudden paradigm shift that has taken place in Dutch public discourse about multicultural society in the twenty-first century has been well documented (Prins and Saharso 2010; Eyerman 2008). Pim Fortuyn, with his strong criticism of Islam and immigration, appealed to feelings that already existed among certain parts of the population but that had so far been taboo in public discourse. His argument that Islam threatens liberal values, such as gender equality and acceptance of homosexuality, was very different from the far-right discourse that the Netherlands had seen before, his views thus appealed to a much larger audience. As a result:

since May 2002 in the media multiculturalism is self-evidently taken as a hopelessly outmoded and politically disastrous ideology, and firm talk about the need to reanimate 'norms and values' drowns out voices that attest to a more hostile and unwelcome atmosphere for members of ethnic minority groups. (Prins 2002, 377)

Fortuyn also shook the consensus about criminalising hate speech by arguing that the law on hate speech should largely be abolished in order to let freedom of expression prevail. Before the twenty-first century, criminal convictions of far-right politicians received little attention in the Netherlands; most people did not question the fact that

criminal law provisions could curb hate speech in political debate.² Now, the relationship between freedom of expression and non-discrimination, as laid down in the law on hate speech, suddenly became politicised after years of relative neglect.

This discussion intensified after the murder of film director and columnist Theo van Gogh by radical Islamist Mohammed Bouyeri. The trigger for the murder appeared to be the short film 'Submission' (about the mistreatment of women in Islam) that Van Gogh, who was well known for his polemic columns, had made with Ayaan Hirsi Ali (who was now forced to go into hiding). The murder was thus viewed as an attack not only on Van Gogh but on the right to freedom of expression. The idea gained ground that this was much more than a single violent act by an individual and that freedom of speech in general was in danger with radicals using threats and violence against those who insulted their religion. Public discourse about multiculturalism became more extreme with the rise of MP Geert Wilders, who achieved great popularity with his anti-Islam and anti-immigration rhetoric. Harsh criticism of multicultural society, particularly as regards Muslims, became the 'new consensus' in politics and the media.

After the government embarked on actively prosecuting hate speech in the 1990s, the prosecution service started to draft policy directives in this area. Since 1999, these directives set out that as a rule, prosecution must be initiated for hate speech and that the police must take up any report (Discrimination Directive 2007). The prosecution service can still dismiss a case on technical grounds, that is, when a case is not likely to lead to a conviction. However, dismissal for policy reasons should be exceptional. The directive also makes clear that the risk of 'creating free speech martyrs' can never be a valid argument to forego prosecution.

Since then there have been several new judicial rulings on hate speech. In the changing sociopolitical climate of the past decade, the case law around article 137c (group insult) has become more diffuse: judgments of the past decade paint a diverse picture on how this provision is interpreted (Supreme Court e, i and j; Court of Appeal b and c). One important topic that the courts have had to deal with concerns the issue of hate speech on the grounds of religion.

As new inclusion and exclusion lines are drawn on the basis of culture/religion (Schinkel 2007; Modood 1997), a pressing issue that has emerged in recent case law and legislative debates is whether insulting a religion amounts to insulting religious *persons*. This has been a prominent concern in many European countries, in particular around the Danish cartoons affair. In 2009, the Dutch Supreme Court (Supreme Court d) had to deal with the case of a member of the far-right organisation National Alliance, who had placed a poster in a street-facing window with the words 'Stop the cancer called Islam'. The Court of Appeal had ruled this expression to be insulting on the grounds of religion: 'considering the connection between religion and its adherents', this gratuitously an offensive statement about Islam was also defamatory for Muslims, the Court held. The Supreme Court, however, judged that article 137c protects only *persons* from insult and not *religion itself*, and this distinction should be strictly adhered to. An expression can only be

criminal, according to the Supreme Court, if it ‘undeniably concerns a group of people’; criticism, even when strongly worded, of a group’s opinions or behaviour falls outside the ambit of article 137c. As such, the Supreme Court now gave a narrow interpretation of this provision. Strikingly, in the comparable British case of *Norwood*, where a British National Party member was convicted for displaying a poster in the window of his flat with the words ‘Islam out of Britain, Protect the British people’ and a photograph of the Twin Towers, the European Court of Human Rights judged in 2004 that freedom of expression was not violated (ECtHR 2004). This judgement did not directly figure in the Dutch Supreme Court’s judgement, though the Attorney-General set out the differences between the two cases in his advice to the Supreme Court.

The offence of *blasphemy* (see Larsen’s contribution in this issue) has also attracted renewed attention from different sides in the past years. Scornful blasphemy is a criminal offence under Article 147 Criminal Code; however, there have been no prosecutions for this offence since 1968. In the twenty-first century, several opposition parties have called for abolition of article 147 (*Kamerstukken c*). Peaceful relations between different groups actually require discussion about religious matters to be as free as possible, they argue. Moreover, they find legal protection of religious feelings inappropriate. Yet in 2007, after having issued a study on blasphemy and insult on the grounds of religion, the government took the position that the law on blasphemy should be maintained (Ministry of Justice 2007). In 2008, the Minister came with a new proposal in which article 147 would be abolished, since there was a Parliamentary majority in favour of abolition, but article 137c would be widened to include ‘indirect insult’ (Ministry of Justice 2008). This proposal would clarify that expressions which insult a common characteristic of a group, such as expressions that target religious figures, rather than people belonging to that group, was criminal as well. Many felt, however, that this would broaden the law rather than clarifying it. In the end, the *Islam poster judgement* halted the Minister’s plans on article 137c. The proposal to abolish article 147 gained new impetus with the new coalition government’s coming into office at the end of 2012 (a coalition of the People’s Party for Freedom and Democracy (VVD) and the Labour party (PvdA)), and on 16 April 2013 the House of Representatives voted in favour of abolishing the blasphemy law.

Another prominent matter of debate in the past decade has been hate speech in the context of terrorism and radicalisation. In the polarised climate after 9/11, many states and international organisations have looked for ways to prevent radical Muslims from inciting each other to commit terrorist acts through extremist Internet sites. In many countries, *indirect* expressions of support for terrorist acts, such as glorifying the World Trade Center attacks as a ‘conquest over the West’, also came to be regarded as problematic, as exemplified by the criminalisation of ‘encouragement of terrorism’ in England and Wales (Terrorism Act 2006) and by several international legal obligations that came into being in the twenty-first century (such as the Council of Europe’s Convention on the Prevention of Terrorism, which obliges member states to criminalise ‘public provocation to commit terrorism’). In the Netherlands, not long

after the murder of film director Theo van Gogh, the Minister of Justice proposed a bill to criminalise 'glorifying terrorism' (Voorstel van Wet 2005). Prohibiting such expressions was necessary to preserve public order as well as to uphold the quality of public debate, the Minister held: the bill would 'provide an instrument to counter conscious provocation of public feelings, and contribute to improving the climate in society and to a more healthy public debate' (*Kamerstukken e*). The proposal created a storm of criticism as regards its consequences for freedom of expression, the legal uncertainty it would create, and the danger that it would target Muslims disproportionately (Dommering 2005; Vennix 2005). Brants (2007, 292) argued that:

[w]hat the proposed Dutch offence of glorification appears to be about is not so much terrorism, as social unrest and antagonism in a society that feels threatened by the multicultural phenomenon it has become, and has lost the way in recovering, let alone maintaining, any sense of cohesion and inclusiveness.

In the end, the bill was never officially proposed to Parliament because of the criticism raised during the consultation process. Yet there appeared other ways of dealing with radical expressions through criminal law. Shortly after the 'glorifying terrorism' proposal, members of the radical Islamic youth group *Hofstadgroep* were tried for taking part in a criminal/terrorist organisation, which had as its presumed goal to spread radical-Islamic expressions. The case dealt with several vital issues about radical speech and the scope of public debate. One of these questions was whether article 137d must be interpreted 'symmetrically': does the provision protect the *majority* against hate speech or only vulnerable *minorities*? After all, in some of their writings the members had shown hatred to 'non-believers' (a term which, in the group's view, applied to any person who did not share their radical religious views). According to the Court of Appeal, such expressions were not covered by article 137d, because this article was meant to protect vulnerable minorities, and non-believers cannot be regarded as such (Court of Appeal d). However, the Supreme Court rejected this asymmetrical interpretation of article 137d (Supreme Court g). Despite the fact that legislative history echoes the idea that there is less reason to protect the majority, the eventual text of article 137d is not limited to protecting minorities, the Supreme Court stressed. The Court of Appeal furthermore ruled (in an argumentation that the Supreme Court did not delve into) that expressions which denounce democracy and the rule of law, but which do not advocate violence, are allowed under article 137d, including the advocacy of shari'a and theocracy. Distancing oneself from non-believers is not a criminal offence either, and even the expression of intolerance and hostility towards non-believers shall only be restricted if it is 'gratuitously offensive'. The general risk that such extreme speech will lead to overthrowing democracy is not sufficient reason to restrict expressions, according to the Court; making an argument for theocracy or shari'a law does not lead to violence per se.

Parliamentarians had instead suggested that hate speech legislation should be reconsidered in order to make it more suitable for dealing with terrorist speech (*Kamerstukken f*). Several policy documents also make mention of the possible legal

measures against radicals who express opposition to democratic principles (Nota Radicalisme en Radicalisering 2005–2006, 14; *Kamerstukken g*, 8; *Kamerstukken h*, 2–3). This illustrates a tendency to argue in favour of ‘militancy’ against religious minorities who are alleged to be antipathetic to democratic principles, in the period of widespread fear of growing popularity of Islamic radicalism in the Netherlands following the assassination of Van Gogh. Before the twenty-first century, the idea of ‘militant democracy’, limiting the rights of ‘democracy’s enemies’ for the sake of maintaining democracy itself, was primarily geared towards protecting democracy against parties that discriminate against immigrant or religious minorities; this was one of the drivers behind hate speech legislation in the 1970s. In current debates, however, the issue is often linked to protecting the liberal democratic state or the majority against radical minorities. After all, the democratic paradox is particularly pressing in the context of terrorism: according to Ignatieff (2005, 75):

[w]hen a national community is attacked, it naturally favors majority interests over minority rights, and its response to threat draws on everything, shared memory and common symbols as well as constitutional traditions that assert these majority interests.

It is tempting for states to overreact to terrorism in the context of freedom of expression and association, for instance, by restricting expressions which go against the common values or majority interests, such as denouncing the democratic system.

The Wilders Trial

The criminal trial against Geert Wilders (see timeline below) presents a telling illustration of the developments about hate speech in the twenty-first century Netherlands and their wider context. In 2011, the politician was acquitted for several expressions about Islam (such as his comparison of the Qu’ran with *Mein Kampf*) and Muslim immigration (‘no more Muslim immigrants’), including his propaganda-style film *Fitna*.

When in 2008 the question came up whether Wilders should be prosecuted for these utterances, the prosecution policy on hate speech, which had since 1999 proclaimed that prosecution for hate speech is the rule, led to difficulties. After several groups and individuals had reported Wilders’ expressions to the authorities, the prosecution service initially declined to take the case further, allegedly on the grounds that prosecution was not likely to lead to a conviction: his expressions were uttered in the context of a political debate and were directed against Islam rather than Muslims (Prosecution Service 2008). The case law up to that point, however, suggests that a conviction for such expressions was actually possible; therefore, it is likely that policy considerations played a role. Prosecuting Wilders would have given him a grand platform to become a free speech martyr. Nevertheless, the Discrimination Directive clearly states that the danger of creating free speech martyrs is no valid reason to omit prosecution for hate speech.

Subsequently, a group of Muslim organisations lodged a complaint with the Court of Appeal about the prosecution's refusal to take the case further. This was successful: the Court of Appeal ruled that the prosecution must proceed with the case against Wilders (Court of Appeal [a](#)), using an elaborate argumentation to support its case, which in turn gave many people the idea that he had already been convicted.

Accordingly, the growing public controversy around hate speech bans came to light. It now became apparent to the public that the courts could potentially set legal limits to Wilders' political speech. Whereas the legitimacy of Dutch hate speech law had long been taken for granted, it was now questioned. In 2009, partly in reaction to the Court of Appeal's ruling that Geert Wilders should be prosecuted, MPs of the People's Party for Freedom and Democracy (VVD) prepared a legislative proposal to amend hate speech law. They proposed to abolish article 137c altogether, to remove 'incitement to hatred' from article 137d and to restrict the meaning of 'incitement to discrimination' (Elsevier [2009](#)). The MPs pointed to the precarious position of freedom of expression in the Netherlands, arguing that there was an increasing tendency to curb free speech in the polarised society. The murder of Van Gogh and threats to other opinion leaders also led people to self-censorship to avoid violence from radical elements in Islam, according to the drafters. Yet the proposal could not count on much support from most other political parties; when the party announced its plans in the media and it became clear that such a law would also have the effect that Holocaust denial would no longer be a criminal offence, this came as a shock to many people. In 2012 Wilders' party, the Freedom Party (PVV), proposed a similar bill that is now being discussed in Parliament (Voorstel van Wet [2012](#)).

Wilders' prosecution caused much criticism; his supporters viewed it as a political trial, whereas others criticised the process for giving Wilders the chance to make the most of his role as a victim of the established elite and to ridicule the judiciary as part of the 'leftist elite'. The politician himself played this role to the full when he appeared before the Amsterdam court. He successfully requested to recuse the judges, arguing that there had been an attempt by an Appeals Court judge to influence an expert witness which the court refused to investigate; the proceedings had to be started all over again. The prosecution service twice argued for acquittal, for the same reasons as when it initially declined to prosecute the case.

The Amsterdam Court, in the final case, followed many of the prosecutor's arguments in coming to the acquittal of Wilders. In line with the Islam Poster judgement, the Court ruled that Wilders' expressions about Islam were not punishable under article 137c because 'criticism, in whatever form, of a group's opinions or behaviour falls outside the ambit of article 137c' and expressions must 'undeniably concern a group of people' (Court in first instance [a](#)). Some of Wilders' utterances, such as 'you will see that all the evil that Allah's sons conduct against us and against themselves, comes from the Quran' related to *people* and not only to their religion. Yet these expressions contained criticism of people's *behaviour*, according to the Court, which article 137c does not cover. Legislative history indeed suggests so, though strong criticism of people's behaviour was occasionally judged to be a criminal offence under

article 137c in earlier case law (Supreme Court e and f). This clearly indicates how the law is prone to a variety of different interpretations, depending on the argument one wishes to use.

The Court also set forth a strict interpretation of incitement to hatred (art. 137d). Utterances must include a ‘power-strengthening element’ to satisfy this provision, the Court held; since ‘hatred’ is an extreme emotion of deep aversion and hostility, hate speech should have an element of provocation in it. The Court judged that one of Wilders’ utterances was ‘coarse and denigrating’ but not inciting to hatred, although some utterances almost crossed that border. During one interview he said that:

the number [of Muslims] is growing. With aggressive elements, imperialism. Walk in the street and see where this ends (...) A conflict is going on and we have to defend ourselves.

Yet, this did not amount to incitement to hatred, according to the Court, because in the same interview Wilders had said that he was only against Islam and not against Muslims. The Court’s ruling thus seems to imply that Wilders’ speech is right on the border of what is legal, as opposed to what is morally acceptable. However, at the same time the Court itself is further shifting those boundaries.

As to the short film *Fitna*, the Court did find part of it to be inciting, but found that Wilders’ main message was to warn people against the dangers of Islam and that he is allowed to do so as a politician in public debate. Moreover, the Court stressed that multiculturalism and immigration were prominent items in public debate at that time, and ‘as this debate becomes more serious, there must be more room for freedom of expression’. Wilders was also acquitted of incitement to discrimination (art. 137d); even though the Court found his expressions discriminatory as such, there must be much room for a politician to voice his ideas and proposals ‘which he hopes to realise when he comes to power in a democratic manner’.

The judgement thus gives a very strict interpretation of Dutch hate speech law, which is partly a new development (particularly as regards article 137d), but in other respects was preceded by some other recent freedom of speech-minded judgments on article 137c. The judgement in the Wilders case leaves one questioning whether hate speech within the context of public debate can ever be a criminal offence, if the exculpable potential of ‘public debate’ is so wide. The argumentation that immigration was already a widely discussed theme in public debate, also raises questions. After all, one may ask what came first? Wilders’ contribution arguably made this public discourse more extreme than it used to be. Meanwhile, the legislation gives ample guidance, leaving room for multiple interpretations and responding to the changing informal limits of public discourse. As such, the courts have been faced with a series of dilemmas.

The ‘Politicisation’ of the Hate Speech Debate

The Arab-European League (AEL), a Dutch-Belgian movement that aims to promote the interests of Arab and Muslim communities, has recently laid bare what they

regard as hypocrisy in hate speech debate. They published a Holocaust-denial cartoon and several other provocative cartoons in order to demonstrate a double standard in the debate about free speech (see Dommering 2010). On the one hand, Muslims are accused of being oversensitive to expressions concerning their religion. On the other hand, freedom of expression is easily ignored when it concerns issues which the majority in Dutch society regards as insulting. The AEL made clear through press statements that they did not really believe in the cartoon's suggestion that the Holocaust was a lie; it was actually a test case. At the first stage, the Court went along with the group's argument (Court in first instance b) and acquitted the defendants; yet the Court of Appeal and the Supreme Court found the cartoon punishable (Court of Appeal e; Supreme Court h). According to the Court of Appeal, as upheld by the Supreme Court, the goal of addressing double standards in free speech debate does not justify this offensive cartoon. It is telling that the discussion about the limits of freedom of expression has now even reached the courts in this manner, providing the context to a hate speech judgement.

Indeed, the hate speech dilemma itself has become an important part of public discourse on multicultural society. Many argue for the right to speak their mind without any restrictions, but this does not always extend to one's *adversaries* as well. This is apparent in the way radical speech by minorities is dealt with; such issues are not necessarily framed in a 'freedom of speech' lens in the same way as the Wilders trial is. In the polarised sociopolitical climate freedom of expression is not always granted equally to the viewpoints of one's opponents. After the assassination of Fortuyn, some of his sympathisers argued that other political parties had demonised him as an extreme right figure and had thereby shaped a climate conducive to violence. Fortuyn's heirs and the representatives of his political party Pim Fortuyn List (LPF) thus requested the courts to have his critics prosecuted for hate speech, though unsuccessfully (Court of Appeal f). Moreover, Wilders has proposed banning the Quran with the argument that it incites to violence and thus transgresses freedom of expression. Likewise, it is not uncommon to proclaim the freedom to express fundamentalist religious views while pushing for stricter limitations to expressions that offend religious feelings.

On the other side, many still firmly believe in hate speech bans as a means of maintaining a 'decent debate' and preserving social cohesion. This strand is also apparent from a legislative proposal by the Christian Union political party in 2006 to criminalise *denying or grossly trivialising, approving or justifying genocide* (*Kamerstukken* d). Though the courts have ruled that certain forms of genocide denial can already fall under article 137c, according to the drafters an explicit offence is necessary because deliberately denying or trivialising such grave crimes causes deep offence to the members of groups that have been targeted by genocide. The proposal, however, seems not to have enough support in Parliament to be adopted. It is in the same 'decent debate' context that some parties wished to maintain the prohibition of blasphemy: they are firmly convinced that hate speech laws are important means to counter brutality against minority groups.

One may ask whether restricting hate speech in order to maintain social cohesion in a diversified society does not work counterproductively for minorities in the current climate. Hate speech legislation was originally enacted with the idea that it would hardly ever be necessary to prosecute; then in the 1980s–1990s, the government started to tackle hate speech actively in order to take a strong stance against discrimination. The twenty-first century, however, saw a paradigm shift in public debate. The former conviction that hate speech can effectively be countered through criminal law was now challenged. The authorities still attempted to do so, via strict prosecution directives and legislative proposals, but the politicisation of the hate speech debate has made this increasingly difficult. Whereas hate speech proceedings may have functioned effectively to counter extreme forces in society during the 1970s–1980s (Van Donselaar 1991, 222; Norris 2005, 91–92), it is questionable whether this strategy still works in a greatly changed context.

Dealing with hate speech in this changed context can lead to difficulties for the judiciary, especially since hate speech legislation allows for multiple interpretations. On the one hand, such broad legislation can make it easier for the judiciary to act in a flexible manner in a changing social context. On the other hand, case law risks to be regarded as ‘political’ when there is so much leeway, and this is particularly challenging now that the judiciary itself has come under increased scrutiny from populist parties.

In a way it is inherent to hate speech trials that they risk becoming viewed as ‘politicised’: after all, the issue of hate speech itself echoes a delicate balance between fundamental rights. Such fundamental rights, in turn, can put a brake on decision-making by political majorities. However, in the current situation this politicisation of the hate speech debate is particularly strong, making the risks for the judiciary even more pressing. This is, first of all, because of the changed public debate about multiculturalism. An inherent part of this discussion was the idea that one might present oneself as a person who dares say what nobody dared say before, having been prevented by the elite with their ‘political correctness’ (Prins 2002). In the context of a new political correctness, it now seemed unacceptable that hate speech laws could set limits to political speech, something that used to be widely accepted.

Second, the whole idea of the independent judiciary using fundamental rights to set limits to political decision-making is under pressure. It is telling that Wilders stated that ‘if I will be convicted, the Dutch rightly have no trust in the judiciary anymore’.³ In populist politics (which in turn influences ‘mainstream’ political parties), the judiciary is being criticised for being too soft on crime and on immigration, whereas international human rights law is also under siege for standing in the way of some of these endeavours. Thus, the use of freedom of expression as a political tool is accompanied by criticism of the whole idea of fundamental rights as a counterbalance to the majoritarian power of the legislator. There is a contestation of the idea that within a democracy, fundamental rights can set limits to majority decisions—leaning towards the ‘majoritarian premise’ which supposes that it is unfair if the political majority cannot have its way (Dworkin 1996, 15–17). Such majoritarian tendencies, as

well as the challenges to the idea of fundamental rights as particularly important for unpopular minorities, make the judiciary particularly vulnerable for the accusation of 'political' judgments.

Conclusion

This paper has shown the inherent difficulty in using hate speech bans in a society that is not only diversified, but also struggling to find a way of dealing with freedom of speech. Whereas hate speech law had not raised many objections for years, nowadays discussions about multicultural society have led to two opposing tendencies in the debate, which are difficult to reconcile. The hate speech debate has been politicised from different angles. On the one hand, there is the argument that tensions in Dutch society have been covered up for too long and that now is the time to speak up about all wrongs in society. This tendency is enhanced in reaction to the sensitivities of religious groups about insults to their religious convictions and symbols, see the Danish cartoons. On the other hand, there is a tendency to emphasise the need for a cautious public debate in order to keep the peace among different groups in society, which may include legal measures against religious insults and blasphemy (Rijksoverheid 2007). Many are worried that a strongly worded discourse about multiculturalism aggravates social tensions and breaks down social cohesion, and that this will lead to even more exclusion and radicalisation.

In view of the changing modes of discrimination, it is often argued that anti-religious speech has become a particularly pressing problem that must be tackled (rather than just hate speech against people). Criticism of religion or culture is easily used as an excuse to express hatred of groups of *people*; it may also result in incitement to violence or discrimination. The essentialist way of thinking about culture and religion can lead to ascribing certain negative characteristics to everyone who is thought to belong to the group concerned (Allen 2004; EUMC 2002).

Nevertheless, there remain reasons to distinguish between hate speech on the grounds of religion or culture and hate speech on the grounds of physical characteristics or ethnic descent. Religion involves various practices, ideas, ways of life and powerful institutions, matters that should remain open to criticism in a democratic society and that have indeed become causes of growing disagreement. Though such expressions may give offence to persons, using *offence* as the basis for criminal law can be problematic: taking offence is 'constituted by a set of judgments which only an individual can make' (McKinnon 2006, 132). Prohibition thus gives individuals or groups the right to determine what the rest of the people can see or express, on the basis of their own sensibilities. Some groups are offended more easily than others; allowing them to set the limits to free speech would mean that 'the public sphere could shrink in ways that are incompatible with democracy' (Post 2007, 346).

Another problematic feature of hate speech laws is that they have the potential of 'fixing' group identities, of assuming that the sociological traits of a person match that his or her interests (Sadurski 1999, 215). It thus becomes more difficult to define

and express one's individual identity against such stereotypes (Richards 1994, 53). The dilemma, as Minow describes it, is that 'using policies to remedy group-based harms makes the group identities seem all the more real and entrenched, but denying the significance of group-based experiences leaves legacies of harm and stereotyping in place' (Minow 1997, 9).

Butler (1997) also criticises the idea that hate speech would 'silence' minorities and beat them into submission: there is no fixed link between such speech acts and their harmful effects, only in certain contexts and particular power relationships does speech have 'performative' effects:

I wish to question for the moment the presumption that hate speech always works, not to minimise the pain that is suffered as a consequence of hate speech, but to leave open the possibility that its failure is the condition of a critical response ... Even if hate speech works to constitute a subject through discursive means, is that constitution necessarily final and effective? (Butler 1997, 19)

Instead of immediately invoking the criminal law, we may instead try to open the avenues to 'speak back', she argues (see Mårtensson 2014).

Another danger of hate speech bans is that they may be 'well-meant' to protect vulnerable groups, but are eventually used in favour of majority interests, thereby excluding exactly those groups that they intend to protect (Malik 2009). Expressions by minority groups may fall outside the scope of what the majority is used to, outside 'common sense', making it prone to restriction by the majority (Karst 1990).

The Dutch legislature and policy-makers may try to learn from such critical views. In view of the limited potential of criminal law to counter hate speech, the courts' strict interpretation of hate speech law is not unwelcome; however, in the current sociopolitical context more restricted *legislation* would be a better solution, considering the difficulties the judiciary now faces. Likewise, it is vital to nurture the idea that free speech is particularly important for unpopular groups and ideas.

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Timeline Wilders Case

- 1999 First prosecution directive
- 2008 Prosecution decides not to prosecute Wilders
- Jan 2009 Court of Appeal orders Wilders' prosecution
- Mar 2009 Islam poster judgment Supreme Court
- May 2009 VVD proposal for abolishing (most) hate speech legislation
- 2011 Wilders acquitted by Amsterdam Court in first instance

Notes

- [1] Sir Frank Soskice, Home Secretary, House of Commons debate on Race Relations Bill, 3 May 1965 (HC Deb 03 May 1965 vol 711 cc926-1059).
- [2] Although some public figures, including Meindert Fennema, already questioned the way far-right politician Janmaat was treated in public discourse at that time.
- [3] TV programme *Nieuwsuur*, 14 October 2010.

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- Court of Appeal b. The Hague Court of Appeal 11 February 2009, LJN BH2481.
- Court of Appeal c. Amsterdam Court of Appeal 23 November 2009, LJN BK4139.
- Court of Appeal d. The Hague Court of Appeal, 23 January 2008, LJN BC2576 / BC4171 / BC4129 / BC4177 / BC4182 / BC4178.
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